The AkzoNobel Case: An Activist Shareholder's Battle against the Backdrop of the Shareholder Rights Directive

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1. INTRODUCTION

This year, the Dutch courts ruled two times in the AkzoNobel case. Two times, the courts denied the requests of activist shareholders of AkzoNobel to convene an extraordinary general meeting (EGM) to dismiss AkzoNobel's chairman of the supervisory board. The reason for the shareholders' request was the decision of AkzoNobel's board not to engage in negotiations with PPG Industries (PPG) concerning its takeover bid on AkzoNobel. The main arguments of the courts were based on the idea that the decision on a takeover bid is part of the company's strategy, which belongs to the domain of the board, and that the shareholders failed to show a reasonable interest for convening an EGM. Therefore, it seems that the courts in the AkzoNobel case imposed significant restrictions to shareholder rights relating to the general meeting, in favour of the autonomy of the board and the interests of other stakeholders.

These decisions raise the question: are the decisions in the AkzoNobel case consistent with earlier Dutch case law? And are these decisions compatible with the Shareholder Rights Directive?[1] This article discusses both decisions in the AkzoNobel case. Afterwards, the broader Dutch legal framework is explained. In particular, other Dutch case law is discussed concerning the restriction of shareholder rights to add items to the agenda of the general meeting or to convene a general meeting, such as the Boskalis/Fugro case and the Cryo-Save case. Finally, the compatibility of the Dutch legal framework with the Shareholder Rights Directive is analysed.

2. FACTS OF THE AKZONOBEL CASE

On 2 March 2017, PPG Industries (PPG), an American paint and coatings company, made an unsolicited takeover bid for its Dutch rival, AkzoNobel. AkzoNobel's supervisory board and management board refused to negotiate with PPG, however, even after the latter upped its bid twice. They argued that PPG's bid was not in the interest of AkzoNobel's stakeholders, including its shareholders, and that AkzoNobel was in a strong position as a stand-alone company. In addition, the board argued that the bid undervalued AkzoNobel and that there were some serious concerns, for example of competition law.[2]

Some shareholders, such as the activist shareholder Elliott International L.P. ('Elliott'), did not agree with the board's approach and requested the supervisory board to convene an EGM in order to vote on the dismissal of AkzoNobel's chairman, Antony Burgmans, who had been a vehement critic of the takeover bid by PPG.

The board denied this request, however, arguing that the EGM was not in AkzoNobel's best interest and was not in accordance with legal requirements.[3] Following this decision, Elliott filed for inquiry proceedings ('*enquêteprocedure*') concerning the decisions of the board concerning the PPG takeover bid. In the context of this procedure, Elliott asked the court to take 'immediate measures' ('*onmiddellijke voorzieningen*') and order AkzoNobel to call an EGM to vote on Mr Burgmans' position.

3. THE FIRST DECISION IN THE AKZONOBEL CASE

In its decision of 29 May 2017, the Enterprise Chamber rejected the request for immediate measures, finding no

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1 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184/17.

2 Court of Amsterdam (Enterprise Chamber), 29 May 2017, *Elliott International, L.P. v. Akzo Nobel N.V.*, ECLI:NL:GHAMS:2017:1965, paras 2.13–2.14 (hereinafter '*Elliott v. Akzo Nobel (I)*').

3 *Elliott v. Akzo Nobel (I),* para. 2.46.

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serious grounds to question the proper management of the company.[4]

Firstly, the Enterprise Chamber decided that the supervisory board and the management board did not violate the duty of care ('zorgvuldigheidsnorm') by not engaging in negotiations with PPG, as there is no general principle in Dutch law that obliges a company to negotiate with potential bidders.[5] The Enterprise Chamber affirmed that the management board, under supervision of the supervisory board, is competent for determining the company's strategy.[6] In principle, the board is accountable towards shareholders for its strategy, but it does not necessarily has to consult the shareholders before deciding on a matter falling under its competence. The Chamber considered that the boards acted in an informed manner, after meeting multiple times and after consulting with several expert advisers and stakeholders.

Secondly, the Enterprise Chamber did not consider the board's refusal to convene an EGM a sufficient reason to doubt the proper management of the company either. Hence, it declined to order any immediate measures in the inquiry proceedings. The Enterprise Chamber considered that the request to convene an EGM was not only motivated by the desire to oust Burgmans as a chairman, but also partly by the desire of the shareholders to change the strategy of the company, which belongs to the competence of the board.[7] The decision of the Enterprise Chamber also relied on a procedural argument: a shareholder request to convene a general meeting should be filed with the court in summary proceedings ('*voorzieningenrechter*') under Articles 2:110 and 2:111 of the Dutch Civil Code, and not with the Enterprise Chamber in an inquiry proceeding.[8]

After the decision of the Enterprise Chamber, on 1 June 2017, PPG retracted its takeover bid,[9] because the 'put up or shut up' deadline had passed. This implies that it could not launch a takeover bid for at least six months, i.e. until 1 December 2017.[10]

4. THE DEBATE ON THE AGENDA OF THE EGM OF 8 SEPTEMBER 2017

Despite the fact that PPG had retracted its takeover bid after the decision of the Enterprise Chamber, Elliott had lost all trust in AkzoNobel's chairman and still wanted to dismiss him. On 7 July 2017, it filed for summary proceedings with the tribunal of Amsterdam ('*voorzieningenrechter*') in order to convene an EGM with the goal of dismissing AkzoNobel's chairman.

AkzoNobel responded by announcing on 25 July 2017 that it would convene an EGM on 8 September 2017, but without adding the dismissal of its chairman to the agenda. The only agenda items for the announced EGM were an explanation by AkzoNobel's board of its decisions concerning the PPG bid, and the approval of AkzoNobel's new CEO, Thierry Vanlancker, because AkzoNobel's old CEO, Ton Büchner, stepped down due to health reasons.

The announcement for the EGM of 8 September 2017 was made forty-five days before the EGM, which is in accordance with the statutory period of at least forty-two stipulated in Article 2:115 of the Dutch Civil Code. However, shareholders could not add items to the agenda of this EGM, as this should be done sixty days before a general meeting (Article 2:114a of the Dutch Civil Code). This enraged Elliott and other shareholders, who argued that this violated the rights of shareholders.

The impossibility to add items to the agenda is a logical consequence of Dutch law, however, which stipulates a deadline for adding items to the agenda of a general meeting that is earlier than the deadline for convening a general meeting. Nevertheless, this might be surprising for company lawyers outside the Netherlands. In Belgium, for example, the situation is precisely the reverse: the deadline for adding items to the agenda is twenty-two days before the general meeting (Article 533ter of the Belgian Companies Code), while the deadline for convening a general meeting in a listed company is thirty days (Article 533§2 of the Belgian Companies Code). This ensures that shareholders who own more than 3% of the share capital always have some time in between to request to add items to the agenda.

After this, Elliott's only hope to oust AkzoNobel's chair was the summary proceedings to convene a general meeting before the tribunal of Amsterdam.

5. THE SECOND DECISION IN THE AKZONOBEL CASE

In the summary proceedings, Elliott joined forces with another shareholder, York, and argued that the conditions under Dutch law

4 Court of Amsterdam (Enterprise Chamber), 29 May 2017, *Elliott International, L.P. v. Akzo Nobel N.V.*, ECLI:NL:GHAMS:2017:1965. For a discussion of the first decision (in Dutch), *see* F. G. K. Overkleeft, *AkzoNobel, PPG en de Ondernemingskamer*, 2017 Maanblad voor Ondernemingsrecht 135 (2017); M. J. G. C. Raaijmakers, *AkzoNobel. Bestuursautonomie in beurs-NV: behoud stand-alone-strategie en afwijzing overnamevoorstel*, 2017 Ars Aequi 713 (2017); Frank M. Peters & Floor Eikelboom, *De strijd over het agenderingsrecht tussen Elliott en Akzo*, 7156 Weekblad voor Privaatrecht, Notariaat en Registratie 496 (2017).

5 *Elliott v. Akzo Nobel (I),* paras 3.14–3.16 and para. 3.24.

6 *Ibid.*, para. 3.9. This was also decided earlier in the ABN AMRO case and the ASMI case: Dutch Supreme Court, 13 July 2007, *ABN AMRO*, ECLI:NL:HR:2007:BA7972; Dutch Supreme Court, 9 July 2010, *ASMI*, ECLI:NL:HR:2010:BM0976.

7 *Elliott v. Akzo Nobel (I),* 3.28.

8 *Ibid.*, 3.36. Peters and Eikelboom are very critical about this procedural argument and argue that the competence of the 'voorzieningenrechter' is not exclusive: Peters & Eikelboom, *supra* n. 4, at 499–500.

9 PPG, *PPG Announces Decision to Withdraw Proposal and Not Pursue Offer for AkzoNobel* (1 June 2017), http://corporate.ppg.com/Media/Newsroom/2017/06-01-2017-PPG-announces-decision-to-withdraw-pr.

10 Art. 2(2) Decree Public Takeover Bids (Besluit van 12 Sept. 2007, houdende implementatie van richtlijn nr. 2004/25/EG van het Europees Parlement en de Raad van de Europese Unie van 21 Apr. 2004 betreffende het openbaar overnamebod (PbEU L 142) en houdende modernisering van de regels met betrekking tot het openbaar overnamebod (Besluit openbare biedingen Wft)), nr. BWBR0022511.

for a shareholder's request to convene a general meeting were fulfilled: they owned more than 10% of the share capital, they had previously asked the supervisory board in writing to convene the general meeting, and neither of the boards had responded with the necessary actions to hold a general meeting (Article 2:110 of the Dutch Civil Code). However, AkzoNobel and its supervisory board argued that these shareholders did not have a 'reasonable interest' ('*redelijk belang*') in convening the general meeting, as required by Article 2:111 of the Dutch Civil Code.

It is the latter concept that is the central element in the dispute. The supervisory board and AkzoNobel stated that the dismissal of its chairman was disproportionate, harmful and not in the best interest of AkzoNobel. They argued that the shareholders should wait before convening an EGM until after the general meeting of 8 September 2017, where the supervisory board will explain its behaviour concerning the PPG bid.[11]

Elliott and York, on the other hand, stated that the legislative intent behind the requirement of a 'reasonable interest' was solely to avoid bullying and that a rejection of a shareholder's request to convene an EGM can only be justified in exceptional circumstances.[12] They argued that they have a reasonable interest in convening an EGM, because they (and a large number of other shareholders) have lost all trust in AkzoNobel's chairman, and that the explanation given by the board will not be able to alleviate their concerns.

In a decision of 10 August 2017, the tribunal of Amsterdam rejected Elliott and York's interpretation of the concept of 'reasonable interest', however.[13] It considered again that a company's strategy is the domain of the management board, under supervision of the supervisory board. According to the court, the principle of reasonableness and fairness implies that if the power to dismiss directors is used by shareholders as an instrument for punishing them for a certain policy, directors should be given the possibility to explain themselves during a general meeting before the one requested.[14] The court decided that the request of Elliott and York was premature and that they should wait for the explanation given by the board during the general meeting of 8 September 2017. Elliott and York can file for a new request afterwards.

6. UNDERSTANDING THE DECISION FROM A DUTCH PERSPECTIVE

While this decision might come as a surprise for company lawyers outside the Netherlands, it is not surprising from a Dutch perspective, as it is consistent with the Dutch stakeholder model and with previous case law in the Netherlands.

For example, in the Boskalis/Fugro case,[15] Boskalis B.V. was a 20% shareholder in Fugro N.V. Boskalis requested to add an item to the agenda of the general meeting (in accordance with Article 2:114a of the Dutch Civil Code): a shareholder vote on a recommendation to the management board and the supervisory board of Fugro to dismantle one of the anti-takeover arrangements of Fugro. The board declined to add this item to the agenda as a voting item, and only added it as a discussion item. The president of the court of Den Haag in summary proceedings rejected Boskalis' challenge to the board decision. The court held that the decision fell under the board's competence to set the company's strategy and that a shareholder vote would infringe on this competence.[16] This decision has been criticized by some authors, however, who argue that shareholders can make a recommendation to the board for matters not falling under their competence, and that the decision of the court is not in conformity with the Shareholder Rights Directive (see further below).

In another case, the Cryo-Save case,[17] the right of shareholders to convene a general meeting was also severely restricted. In this case, Amar, a controlling shareholder in Cryo-Save, was not satisfied with the company's strategy and requested the board of Cryo-Save to convene an EGM in order to appoint himself as the new CEO of the company. However, Cryo-Save's board invoked the 180-day 'response time' from the Dutch Corporate Governance Code[18] to postpone the EGM.

The Enterprise Chamber, ruling on a request for immediate measures in an inquiry proceeding, held that the board could invoke the response time and that a response time invoked by the board can only be ignored if sufficiently serious reasons are present.[19] According to the Enterprise Chamber, this follows from the principle of 'reasonableness and fairness' in Article 2:8 of the Dutch Civil Code.[20] This is somewhat surprising, because the Corporate Governance Code is only a non-binding self-regulatory document,

11 Tribunal of Amsterdam (Voorzieningenrechter), 10 Aug. 2017, *Elliott International, L.P. v. Akzo Nobel N.V.*, ECLI:NL:RBAMS:2017:5845, para. 4.6 (hereinafer '*Elliott v. Akzo Nobel (II)*').

12 *Elliott v. Akzo Nobel (II)*, para. 3.2.

13 *Ibid.*, para. 4.5 and following.

14 *Ibid.*, para. 4.7.

15 Tribunal of The Hague (Voorzieningenrechter), 17 Mar. 2015, *Boskalis Holding B.V. v. Fugro N.V.*, ECLI:NL:RBDHA:2015:3452. For a discussion of this case (in Dutch), *see* Frank M. Peters & Floor Eikelboom, *De strijd over het agenderingsrecht tussen Boskalis en Fugro*, 7061 Weekblad voor Privaatrecht, Notariaat en Registratie 407 (2015) (very critical of the decision); T. C. A. Dijkhuizen, *Boskalis/Fugro: het agenderingsrecht verder uitgehold?*, Bedrijfsjuridische Berichten 1 (2016).

16 Paras 4.7–4.9.

17 Court of Amsterdam (Enterprise Chamber), 6 Sept. 2013, *Cryo-Save Group N.V. v. Amar*, ECLI:NL:GHAMS:2013:2836. For a discussion of this case (in Dutch), *see* Rien Abma, *Rechtskarakter responstijd*, 16 Ondernemingsrecht 117 (2013); Harm-Jan De Kluiver, *Reactie op commentaar bij uitspraak Cryo-Save Group/Salveo Holding*, 17 Ondernemingsrecht 127 (2013); H. A. van Hulst & M. R. W. Boer, *Cryo-Save – de responstijd in de praktijk*, 12 Vennootschap & Onderneming 219 (2013); M. J. G. C. Raaijmakers, *Een dreigende vijandige overname van een onbeschermde beurs-NV*, 2014 Ars Aequi 197 (2014).

18 Currently best practice provision nr. 4.1.6 and nr. 4.1.7 of the Dutch Corporate Governance Code.

19 Para. 3.11.

20 Paras 3.9 and 3.10.

and because the 180-day response time contradicts the statutory deadlines to add items to the agenda or to convene a general meeting.[21]

Several authors have criticized the Cryo-Save decision, arguing that the right of shareholders to convene a general meeting can only be deviated from in exceptional circumstances, such as in case of abuse.[22] This is the opposite rule as the one stated in Cryo-Save, where the Enterprise Chamber held that the response time should always be honoured, except in extreme circumstances. Other authors have defended the Cryo-Save decision.[23] They favour a large role for the Enterprise Chamber in interpreting the principles of reasonableness and fairness and they view the Dutch Corporate Governance Code as an expression of the general legal opinion that shapes the principles of reasonableness and fairness.[24]

In conclusion, the decisions in the AkzoNobel case are consistent with earlier decisions in the Boskalis/Fugro case and the Cryo-Save case. It seems generally accepted in Dutch company law that the rights of shareholders to convene a general meeting or to add points to the agenda of the meeting can be restricted when they are used to change a company's strategy, as the board has a large autonomy to decide on the strategy.

Restriction of shareholder rights and a large autonomy for the board are also consistent with the Dutch stakeholder model, i.e. the idea that the board should not only pursue the interests of shareholders, but rather of all relevant stakeholders. An expression of the Dutch stakeholder model can be found in the ABN AMRO case, where the Dutch Supreme Court decided that directors should consider '*the interests of all stakeholders, including those of shareholders*'.[25] In addition, in the first decision in the AkzoNobel case, the Enterprise Chamber applied the stakeholder model and came to the conclusion that the board could decide not to support a takeover bid, even if this bid is preferred by a majority of the shareholders of the target company, and even if the bid would create more value for shareholders than a stand-alone strategy could.[26] Finally, the Dutch Corporate Governance Code confirms the stakeholder model by stating that the directors of a company have to consider the interests of all stakeholders in pursuing the goal of long-term value creation for the company (principle 1.1).

The Netherlands is quite exceptional in making this very explicit choice for the stakeholder model. For example, Belgium seems to have chosen for a '(long-term) shareholder model'.[27] The Belgian Court of Cassation has ruled that '*the interest of a company is determined by the collective profit interests of the company's current and future shareholders*'.[28] Consistent with this view of the company's interest (and to my best knowledge), there is no case law in Belgium that imposes substantive restrictions to the right of shareholders to request to convene a general meeting or add items to the agenda of the meeting. In contrast to the Netherlands, there is also no explicit statutory requirement in Belgian law that shareholders should have a 'legitimate interest' in convening the general meeting or adding items to the agenda (cfr. Articles 532 and 533ter of the Belgian Companies Code), but only a rule from general company law that shareholder rights (like other rights) cannot be abused.

7. COMPATIBILITY WITH THE SHAREHOLDER RIGHTS DIRECTIVE

This article is not the place to engage in the elaborate debate on whether corporate law should follow the shareholder model or the stakeholder model. However, this article does discuss whether the Dutch case law inspired by the stakeholder idea is still compliant with the Shareholder Rights Directive.

Article 6(1) of this directive stipulates:

> *Member States shall ensure that shareholders, acting individually or collectively: (a) have the right to put items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution to be adopted in the general meeting; and (b) have the right to table draft resolutions for items included or to be included on the agenda of a general meeting.*
>
> *Member States may provide that the right referred to in point (a) may be exercised only in relation to the annual general meeting, provided that shareholders, acting individually or collectively, have the right to call, or to require the company to call, a general meeting which is not an annual general meeting with an agenda including at least all the items requested by those shareholders.*

In short, this means that Member States need to ensure that shareholders have the right to put items on the agenda of the general meeting, but that Member States have the possibility to restrict this right to the annual general meeting, provided that shareholders have the right to call a general meeting with an agenda including at least all the items requested by them.

21 Abma is very critical of this aspect of the Enterprise Chamber's decision, especially considering the fact that the 180-day response time is not widely accepted by institutional investors, according to him: Abma, *supra* n. 17, at 117, para. 9.

22 Abma, *supra* n. 17, at 117; van Hulst & Boer, *supra* n. 17, at 219, 221–222.

23 E.g. Kluiver, *supra* n. 17, at 127.

24 The latter was also confirmed in: Dutch Supreme Court, 9 July 2010, *ASMI*, ECLI:NL:HR:2010:BM0976, para. 4.4.2 sub (iii); and Dutch Supreme Court, 13 July 2007, *ABN AMRO*, ECLI:NL:HR:2007:BA7972, para. 4.4.

25 Dutch Supreme Court, 13 July 2007, *ABN AMRO*, ECLI:NL:HR:2007:BA7972, para. 4.5. The original quote is: *'ook hier geldt dat het bestuur bij de vervulling van zijn bij wet of statuten opgedragen taken het belang van de vennootschap en de daaraan verbonden onderneming behoort voorop te stellen en de belangen van alle betrokkenen, waaronder die van de aandeelhouders, bij zijn besluitvorming in aanmerking behoort te nemen'.*

26 *Elliott v. Akzo Nobel (I)*, para. 3.34.

27 Arguing in favour of this view: Alain François, *Het vennootschapsbelang in het Belgische vennootschapsrecht: inhoud en grondslagen* (Intersentia 1999).

28 Belgian Supreme Court, 28 Nov. 2013, 2014 Tijdschrift voor Rechtspersoon en Vennootschap 286, 287. The original quote is: *'Het belang van een vennootschap wordt bepaald door het collectief winstbelang van haar huidige en toekomstige aandeelhouders.'*

This provision from the Shareholder Rights Directive might be problematic for Dutch law. For example in the AkzoNobel case, Elliott and York had neither of these options: they could neither add items to the agenda of the general meeting, because the deadline of sixty days had already passed, nor convene an EGM, because the court did not consider the requirement of 'legitimate interest' fulfilled. The central question is thus whether the Shareholder Rights Directive prohibits that Member States create such hurdles for shareholders to convene a general meeting or add items to the agenda.

Article 6 only explicitly guarantees the right to add items to the agenda of a general meeting. The text of the article does not contain a possibility for imposing additional substantive hurdles for exercising shareholder rights, such as the Dutch case law seems to have done. Article 3 only allows Member States to strengthen shareholder rights, not to restrict them. When the Dutch legislator implemented[29] the Shareholder Rights Directive, the previously existing condition of a 'legitimate interest' for adding items to the agenda of the general meeting was dropped, because this was considered impermissible under the directive.[30]

Based on these facts, Peters and Eikelboom have argued that imposing additional requirements is not allowed under the Shareholder Rights Directive and that the principles of reasonableness and fairness have to be interpreted in conformity with this directive.[31] The only possible exception to the rights granted by the Shareholder Rights Directive, is the doctrine of 'abuse of EU law'. This doctrine requires both an objective element (a violation of the purpose of the rules) and a subjective element (an intention to obtain an undue advantage),[32] which is a much stricter standard than the one under the present Dutch case law.

In addition, Peters and Eikelboom argued that, even though the right to convene a general meeting is not explicitly protected by the Shareholder Rights Directive, Article 6 of the directive also applies to this right if it is combined with a request to add an item to the agenda and if this agenda item cannot be postponed to a subsequent general meeting.[33] However, this last argument does not seem to have a basis in the text of the directive. Hence, it seems that the Shareholder Rights Directive does not necessarily invalidate the case law discussed above: the decisions in the Cryo-Save case and in the AkzoNobel case concerned the right to convene a general meeting, which is not directly protected by the Shareholder Rights Directive, unlike the right to add items to the agenda. In addition, the Boskalis/Fugro case related to an agenda item that fell outside the competence of the general meeting. It seems likely that the Shareholder Rights Directive only intended to guarantee the rights of shareholders to add items to the agenda that are within the competence of the general meeting.

However, from Article 6 of the Shareholder Rights Directive follows that the case law in Cryo-Save and AkzoNobel (which concerned the right to convene a general meeting) cannot simply be extended to the right to add items to the agenda, as this would add an impermissible substantive hurdle to the exercise of a right guaranteed by the Shareholder Rights Directive. This means that invoking the response time stipulated in the Dutch Corporate Governance Code (as was done in the Cryo-Save case) should in principle not be allowed when it concerns a request to add an item to the agenda, as the Code contradicts the Shareholder Rights Directive on this point.[34]

In addition, there is the issue that the deadline under Dutch corporate law for adding items to the agenda (sixty days – Article 2:114a Dutch Civil Code) is longer than the minimal period for convening a general meeting (forty-two days – Article 2:115 Dutch Civil Code), which robbed shareholders of the possibility of adding items to the general meeting in the AkzoNobel case. Article 6(3) of the Shareholder Rights Directive grants Member States the freedom to set a deadline for adding items to the agenda. However, the rationale of the deadline was to enable other shareholders to receive or have access to the revised agenda or the proposed resolutions ahead of the general meeting.[35] By setting the deadline earlier than when the agenda for the general meeting is even published, the Dutch legislator ignored the rationale behind Article 6(3). Hence, it can be argued that this takes away the '*effet utile*' of Article 6 of the Shareholder Rights Directive, especially considering the fact that shareholders are unable to request to convene an EGM either under the present Dutch case law. Taken together, this almost completely eliminates the possibility for shareholders to influence the general meeting, as became clear in the AkzoNobel case.

In conclusion, an argument can be made that even though Dutch law is in conformity with the text of Article 6 of the Shareholder Rights Directive, it violates the purpose of this article. It is unclear,

29 Law of 30 June 2010, 'tot wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen (PbEU L 184)', nr. 257.

30 Explanatory Memorandum, 'Wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen (PbEU L 184)', Parliamentary Document nr. 31746/3.

31 Peters & Eikelboom, *supra* n. 4, at 501.

32 *See* e.g. CJEU, Case C-155/13 of 13 Mar. 2014, *SICES*, ECLI:EU:C:2014:145, paras 30–33; Peters & Eikelboom, *supra* n. 4, at 501.

33 Peters & Eikelboom, *supra* n. 4, at 502.

34 *See also* Abma, *supra* n. 17, at 117, para. 11.

35 *See* the text of the original commission proposal (COM(2005) 685 final): Proposal for a directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, 5 Jan. 2006.

however, whether this will have any practical impact on the rights of shareholders in the Netherlands. In any case, the argument of conformity with the Shareholder Rights Directive was not considered in either decision of the AkzoNobel case.

8. DEVELOPMENTS IN THE AKZONOBEL CASE AFTER THE COURT DECISIONS

After Elliott bit the dust for the second time with the Dutch courts, it concluded a standstill agreement with AkzoNobel, where it agreed to suspend all ongoing litigation for three months.[36] This agreement was mainly aimed at the ongoing inquiry proceedings, which were meant to go to trial on 20 September 2017, but were cancelled at the request of both Elliott and AkzoNobel. Elliott also agreed to support the nomination of the new CEO, Thierry Vanlancker, the separation of the Specialty Chemicals department proposed by AkzoNobel, and the two new directors that were nominated for the supervisory board. In return, AkzoNobel agreed to consult with its shareholders, including Elliott, to nominate a third director for its supervisory board.

On 8 September 2017, AkzoNobel held an EGM where Thierry Vanlancker was formally appointed as the new CEO of AkzoNobel. On the same day, however, AkzoNobel also announced a profit warning, stating that it would not be able to achieve the profit increase that it announced earlier. In addition, the current CFO of AkzoNobel, Maëlys Castella, announced that she would step down for health reasons.[37] Anthony Burgmans, AkzoNobel's current chairman of the supervisory board, had already announced earlier that he would step down in April 2018, when his mandate would end, 'absent exceptional circumstances'.[38] The most important question now, of course, is whether PPG will attempt to make another bid after 1 December 2017, when the statutory prohibition to do so will end. Some commentators seem to believe that this is a realistic option, while others believe that there is too much 'bad blood' between PPG and AkzoNobel.[39]

Even without Burgmans as a chairman of the supervisory board of AkzoNobel, PPG still faces an uphill battle, as AkzoNobel can rely on an anti-takeover arrangement dating from 1926. In this year, a foundation that can only be governed by AkzoNobel supervisory board members, was set up and was granted forty-eight priority shares in AkzoNobel. Articles 25 and 32 of the articles of association of AkzoNobel[40] give these priority shares the right to make binding nominations to respectively the supervisory and management boards. The Foundation Akzo Nobel has confirmed that it will only make use of this right in exceptional circumstances.[41] An amendment to Dutch law in 1928 allowed such binding nominations to be abolished by a two thirds majority of shareholders,[42] but AkzoNobel's arrangement was grandfathered, and it is the only example of such a structure to remain in place today. This means that the boards of AkzoNobel still possesses a powerful anti-takeover defence if PPG would launch a hostile takeover bid, making it essentially impossible to acquire control over AkzoNobel without the board's permission.

9. CONCLUSION

The decisions in the AkzoNobel case provide an excellent example of the far-reaching consequences of the Dutch choice for the stakeholder model. Both decisions consider the decision on a takeover bid as part of the company's strategy, which belongs to the domain of the management board, under supervision of the supervisory board. Shareholders are denied the right to convene an EGM or add items to the agenda, if this right is used to influence the company's strategy, for example by proposing to dismiss one of the company's directors.

These decisions seem to follow a trend in Dutch corporate law to reinforce the autonomy of company boards. As noted above, however, this might be considered as a violation of the Shareholder Rights Directive: the right to add items to the agenda is guaranteed by this directive without any additional substantive requirements (save in case of abuse of EU law), while Dutch case law does seem to impose additional requirements that allow the board to reject such requests.

Symbolic for this trend of more board autonomy is also the proposal by the Dutch Minister of Economic Affairs, Henk Kamp, to give boards of Dutch companies one year of 'reflection time' when they receive an unsolicited takeover bid.[43] Whether this trend is a good thing is up for debate, and this article is not the place to settle this debate. Still, it is clear that Dutch law goes further in this trend than many other European countries (including Belgium) and that it is probably the most ardent supporter of the 'stakeholder model' in company law. The decisions in the AkzoNobel case nicely illustrate this fact.

36 AkzoNobel NV, *AkzoNobel Reaches Agreement with Elliott* (16 Aug. 2017), https://www.akzonobel.com/for-media/media-releases-and-features/akzonobel-reaches-agreement-elliott.

37 Financieel Dagblad, *Winstwaarschuwing AkzoNobel, cfo stopt vanwege gezondheidsproblemen* (8 Sept. 2017), https://fd.nl/ondernemen/1217502/cfo-van-akzo-nobel-op-ziekteverlof.

38 De Volkskrant, *AkzoNobel gaat in de tegenaanval tegen activistisch aandeelhouder Elliott* (25 July 2017), https://www.volkskrant.nl/economie/akzonobel-gaat-in-de-tegenaanval-tegen-activistisch-aandeelhouder-elliott~a4507997/.

39 The Telegraph, *Off with the War Paint – But AkzoNobel Still Has a Job On* (16 Sept. 2017), http://www.telegraph.co.uk/business/2017/09/16/war-paint-akzonobel-still-has-job/.

40 Articles of Association of AkzoNobel NV (unofficial translation), https://www.akzonobel.com/about-us/how-we-operate/articles-association.

41 AkzoNobel, *Annual Report 2016*, http://report.akzonobel.com/2016/ar/servicepages/report-downloads.html.

42 *See* current Art. 2:133 of the Dutch Civil Code.

43 Ministry of Economic Affairs, *Letter to the Parliament Concerning Takeovers of Companies (Kamerbrief overnames van bedrijven)* (20 May 2017), https://www.rijksoverheid.nl/documenten/kamerstukken/2017/05/20/kamerbrief-overnames-van-bedrijven.